

Draft Civil Mediation Pilot Program Guidelines
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL MEDIATION PILOT PROGRAM GUIDELINES

1. Description.

The Superior Court of California, County of Orange (Court), offers a voluntary civil mediation pilot program for all civil cases.

Civil mediation program information will be provided to counsel at the time of filing a new complaint, as part of the Alternative Dispute Resolution (ADR) Information Package. The ADR Information Package must be served on all parties with the summons and complaint.

2. Eligible Cases.

The mediation program is available as a pilot program for limited and unlimited civil cases filed at the Central Justice Center in Santa Ana.

3. Initiation of Mediation Process.

Mediation is available on a voluntary basis only. The parties may, at any time, request a referral to the mediation process by filing the Stipulation to Participate form, and completing and submitting a Neutral Selection and Party List form. The parties may choose from the Court's civil mediation panel an available mediator with no apparent conflict of interest and an alternate mediator. Upon receipt of the required documents, the Court may refer the parties to mediation.

4. Assignment of Mediator.

- a. In all cases referred to mediation, the parties must designate a mediator and an alternate. The alternate will be assigned in the event the primary mediator is unable to serve. Mediators may not arrange their own alternates for matters they cannot mediate.
- b. Once the parties have selected a mediator, the Civil Clerk's Office will immediately send a Notice of Assignment of ADR Neutral (Notice of Assignment) and a copy of the Party List to the mediator.
- c. Upon receiving the Notice of Assignment and Party List, the mediator must assess whether he or she can mediate the matter assigned. This initial assessment will include a review for conflict of interest involving the parties/counsel listed on the Party List and an assessment of her or his own calendars to determine if the matter can be mediated within the court's time frame.
- d. Within ten (10) days of receipt of the Notice of Assignment, the mediator must submit a completed ADR Neutral Acceptance or Recusal form, specifying whether the mediator accepts the assignment or rejecting the assignment. The form must be submitted to the Court and served on all parties.
- e. If a mediator is unable to accept an assignment, the alternate will be assigned. The alternate must schedule and complete the mediation session within the original appointment timeframe. Because of the limited amount of time a case can be in mediation, it is extremely important that matters be returned to the court in a timely fashion. The court, the alternate and fellow mediators will appreciate the speed in which the mediator handles this process.

Draft Civil Mediation Pilot Program Guidelines

- f. If, after the initial 10-day period, it becomes apparent that the mediator is not available to schedule or reschedule the matter due to calendar or other conflicts, the case should be returned to the Civil Clerk's Office so that the alternate may be assigned. If the case is scheduled for mediation and the parties must postpone, causing the mediator to become unavailable, the mediator should send an ADR Completion Report to the Court so that an alternate may be appointed.

5. Authority of Mediator.

- a. All parties are required to attend the mediation session and every effort should be made to encourage attendance. The Court acknowledges that it is standard practice in automobile personal injury cases where liability is not contested for insured defendant drivers to not attend or participate in the mediation. However, in cases where liability is contested or in most other mediation cases, all parties should attend the mediation.

The mediator may excuse participants for good cause. The mediator may determine whether persons with settlement authority can attend the mediation telephonically. The Court discourages mediators from allowing adjusters to be on telephonic stand-by to review a settlement at the end of the mediation session when they have not been part of the mediation discussions; and instead encourages mediators who allow telephonic participation to require the adjuster to participate for the entire session.

- b. The mediator may require mediation briefs, statements or other mediation materials. If the mediator requires that materials be sent, he or she should notify the parties directly in writing and include a time deadline for the service of the materials to all other parties. Mediators and parties may not submit copies of pre-mediation materials to the Court.

6. Timelines to Schedule the Mediation Session.

All mediation activity must be completed by the date specified in the Notice of Assignment, which will be 90 days from the date of the Stipulation to ADR, unless otherwise specified by the referring judge. Participation in mediation does not extend any dates or timelines for discovery, filing of motions, or trial dates.

The case should be set for mediation at least 15 days prior to the date specified in the Notice of Assignment for completion of the mediation. While parties may pressure mediators to schedule cases closer to this date, scheduling a case this late often results in cancellation and/or non-mediation of the matter, and mediators are therefore strongly encouraged not to set mediations later than 15 days prior to the date specified in the Notice of Assignment for completion of the mediation.

If the mediator cannot complete the mediation by the date specified in the Notice of Assignment for completion of the mediation, the mediator should complete the ADR Completion Report and return it to the Civil Clerk's Office, so that the Court may track these scheduling problems.

7. Extensions

Under the Civil Mediation Program, the mediator does not have any authority to grant an extension of time to mediate. If the parties need more time, they must file a stipulation with the Civil Clerk's Office to extend the mediation period. The stipulation must include a statement of the facts establishing good cause for the extension, a specific date for the mediation, the signature of the mediator, and a signature line for the judge who originally referred the case to mediation.

Draft Civil Mediation Pilot Program Guidelines

8. Notice of Mediation.

- a. The mediator will serve a Notice of ADR Session on all parties. The Notice of ADR Session must include the date, time and location of the hearing, and the date by which the mediation must be completed.
- b. The mediator must include with the Notice of ADR Session:
 - 1) The mediator's procedures for handling mediation briefs;
 - 2) The fees for the session, including both the reduced rate of \$300.00 for up to the first two hours and the mediator's hourly market rate (even if the mediation is only scheduled for two hours or less).
 - 3) Any other fee requirements, including:
 - a) deposit fees (if the fee is refundable and under what circumstances); and
 - b) any administrative/case management fees (applicable to hour three and beyond only).

9. Ethics and Standards of Practice.

As a condition of civil mediation panel membership, mediators must comply with the California Rules of Court rule 3.850 et seq. Pursuant to these rules, there are several issues that must be raised with parties and participants. In addition, each mediator must read the ethical provisions for conduct and be able to independently assess her or his ability to handle each case. Any disclosures required by California Code of Civil Procedure Section 170.1 and California Rules of Court rule 3.855 must be in writing.

As a minimum, the rules require that eight issues be raised with the parties at or before the commencement of the mediation session. The mediator must:

- a. Check his or her records to ensure that there are no conflicts of interest. If a potential conflict does not require immediate recusal, it must be disclosed in writing to the parties before the mediation begins to give them an opportunity to object (CRC 3.855, CCP §170.1).
- b. Inform the parties at the outset of the first session that any resolution requires the voluntary agreement of the parties (CRC 3.853).
- c. Provide the participants with a general explanation of the confidentiality of the mediation proceeding (CRC 3.854(b)).
- d. Discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants before speaking separately with one or more participants (CRC 3.853(c)).
- e. Provide all participants with a general explanation of the nature of the process, the procedures to be used, and the roles of the mediator, the parties and other participants (CRC 3.857(c)). The mediator should also discuss her or his style.
- f. Inform all participants that during the mediation, he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator (CRC 3.857(d)).
- g. Disclose any personal or financial interest if recommending other services (CRC 3.857(e)).

Draft Civil Mediation Pilot Program Guidelines

- h. Inform all participants of the mediator's lack of competency to testify in any subsequent civil proceeding pursuant to Evidence Code Section 703.5 and the rules governing the confidentiality of mediation proceedings pursuant to Evidence Code Section 1115 et seq.
- i. Disclose in writing to the parties any fees, costs or charges to be paid to the mediator by the parties before commencing mediation.

10. Conducting the Mediation Session

A mediation is defined as a dispute resolution process in which a trained third party neutral (known as a "mediator") facilitates communication between disputants, and assists parties in reaching a mutually acceptable resolution of all or part of their dispute. In this process, the mediator carefully explores not only the relevant evidence and law, but also the parties' underlying interests, needs and priorities. The mediator is not the decision maker and does not resolve the dispute; the parties do. Mediation is a flexible, informal and confidential process that can be less stressful than a formalized trial.

A mediator may employ a variety of techniques, styles and models of mediation during the mediation process in an attempt to reach an informed, voluntary agreement. Appropriate mediator behavior may include, but is not limited to:

- Providing information about the process,
- Addressing obstacles to communication,
- Assisting the participants in defining the issues,
- Exploring alternatives for resolution, and
- Building the capacity of the parties to make an informed decision.

Under the Court's civil mediation program, mediators may offer a personal evaluation or opinion, but only at the parties' request and as a tool used during the mediation. The court strongly discourages mediators from offering opinions about the case early on in the process.

The California Rules of Court, rules 3.856 – 3.858 provide the following for the conduct of a mediation session:

- a. Competence. A mediator must decline to serve or withdraw if the mediator determines that she or he does not have the requisite skill, knowledge and ability to conduct the mediation effectively.
- b. Mediation may not be combined with any other ADR process.
- c. Settlement Agreements. A mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written statement, provided that in doing so, the mediator confines the assistance to stating the settlement as determined by the parties.
- d. Termination. A mediator may suspend or terminate the mediation or withdraw as mediator when he or she reasonably believes the circumstances require it, including whether she or he suspects that:
 - The mediation is being used to further illegal conduct;
 - A participant is unable to participate meaningfully in negotiations; or

Draft Civil Mediation Pilot Program Guidelines

- Continuation of the process would cause significant harm to any participant or third party.
- e. **Marketing.** A mediator may indicate in her or his marketing materials that he or she is a member of the Court's panel, but may not make any representation that he or she is approved, endorsed, certified, or licensed by the Court.

11. Mediator Requirements for Providing Information to the Court.

An ADR Completion Report must be returned to the Court in every case. The Completion Report is due 10 days after the mediation is completed. If the mediation is not completed by the date specified in the Notice of Assignment, the Completion Report must be submitted no later than 10 days after the date specified in the Notice of Assignment for completion of the mediation.

12. Qualifications and Requirements for Civil Mediation Panel Members

To qualify for appointment to the Civil Mediation Panel, an applicant must satisfy the following requirements:

- a. **California Bar Membership.** The applicant must be a member in good standing of the California Bar for a minimum of ten (10) years.
- b. **Training.** The applicant must have successfully completed at least thirty (30) hours of mediator training from a recognized provider. The thirty (30) hours must include:
 - At least one basic/introductory mediator training course consisting of ten (10) hours of classroom training and ten (10) hours of experiential training (e.g., role playing) as outlined by the California Dispute Resolution Programs Act (DRPA) guidelines; and
 - At least five (5) hours of advanced training or specialized training.
- c. **Experience.** The applicant must have conducted at least eight (8) mediations of two (2) hours or more in duration during the past three (3) years. Specifically:
 - 1) At least four (4) of the eight (8) mediations need to be general civil cases (i.e., breach of contract, construction, consumer-merchant, debtor-creditor, employment, homeowners association, neighborhood conflicts, personal injury, real estate). Only two (2) mediations in each of the following categories may apply towards the experience requirement:
 - Small Claims and Small Claims appeals
 - Family law, including: child custody, child support, property division, debt division, alimony, visitation or parent plans, parent-teen
 - Victim offender issues
 - Criminal diversion
 - Juvenile dependency
 - Probate
 - Settlement conferences conducted as mediation sessions
 - 2) Only "co-mediations" conducted through a recognized community based mediation center that utilizes a "co-mediation model" may be applied toward the experience requirement.
 - 3) Arbitrations that become mediations or "med-arb" may not be included.
 - 4) "Mediations" refers to the number of cases mediated, not the number of mediation sessions.

Draft Civil Mediation Pilot Program Guidelines

d. **Disclosure, Disqualifications and Record Keeping Requirements.**

- 1) Applicants must agree to comply at all times with California Code of Civil Procedure §170.1 and California Rules of Court rule 10.781(b)(1).
- 2) All disclosures and disqualifications must be in writing and the writing must be maintained for four (4) years following completion of the mediation.
- 3) Mediators must have the disclosures and disqualifications documents available to the Court upon request.
- 4) Failure to fulfill these requirements is grounds for the mediator's termination from the program.

e. **Place of Business.** Mediators must maintain a primary mediation practice or primary place of business within Orange County (including an Orange County business address and phone number) and conduct all sessions in facilities that are considered professional and appropriate for mediation by the court (i.e., mediation offices, law firms, or other appropriate conference room facilities).

f. **References.** Applicants must provide three references. Two references must be from a person who appeared before the applicant in a mediation (as a party or attorney). The third reference may be from a person who is familiar with the applicant's mediation skills.

g. **Criminal/Disciplinary Actions.** Applicants must notify the Court and provide a written explanation if the applicant has ever been:

- 1) charged with, pleaded guilty or no contest to, or convicted of, a felony or a misdemeanor; or
- 2) suspended or subject to disciplinary action as a result of an investigation from any professional organization, public entity or mediation program.

The Court will take the explanation and circumstances under consideration as it reviews the applications.

h. **Vexatious Litigant.** The applicant must not have been declared a vexatious litigant.

i. **Insurance.** The applicant must have or agree to obtain professional liability insurance covering services as a mediator and to name the Court as an additional insured. Mediators must file their Certificate of Insurance by January 15 of each year, or within 30 days of acquiring insurance.

j. **Pro Bono Services.** Mediators must agree to serve as a mediator on a pro bono or modest-means basis in at least one case per year, not to exceed eight (8) hours, if requested by the Court (CRC 10.781(b)(2)).

k. **Orientation Session.** Applicants must attend a program orientation session required by the Court.

l. **Web Site.** Mediators must permit the court to place mediator information on the court's web site, and in the Court's mediator directories and listings.

m. **Advertisement.** A mediator may indicate in his or her marketing materials that she or he is a member of the Court's panel, but may not indicate that he or she is approved, endorsed, certified or licensed by the Court.

Draft Civil Mediation Pilot Program Guidelines

13. Maintaining Panel Status

To maintain status as a Civil Mediation Panel member, mediators must:

- a. Provide the court with a current and updated Orange County address and biographical information, including the Orange County address of the ADR firm or agency that handles administration for the mediator and direct contact information for the mediator, including phone number and email address.
- b. Have mediated at least one case referred under the Civil Mediation Program within the past 24 months. The operative date to determine mediation will be the date of referral and not the date the case was actually mediated.
- c. Complete four (4) hours of approved continuing education annually focused on mediation skills, process and standards. At least one hour of continuing education should focus on disclosure and disqualification issues.
- d. Comply with the court's procedures regarding mediation timelines, case administration, party notification, post mediation paperwork and program evaluation.
- e. Promptly notify the court in writing if declared a vexatious litigant, the subject of any criminal proceedings (except infractions) or of any proposed or pending disciplinary action by any professional organization, public entity, or mediation program.

14. Compensation

- a. All mediators on the Civil Mediation Panel must abide by the following payment schedule:
 - \$300.00 for up to the first two (2) hours of the mediation session (the "initial period"); and
 - the mediator's individual hourly rate for mediation services beyond the initial period.
- b. The \$300.00 fee for the initial period applies to actual mediation session hours, including any supplemental discussions between the mediator and one or more of the parties during this period. Mediators may not charge any additional fees for intake, scheduling, administration, preparation, case evaluation or brief review time or for the securing of mediation facilities associated with the initial period. Violation of this provision may result in the immediate removal of the mediator from the Civil Mediation Panel.
- c. Mediators may not require more than the \$300 fee for the initial period as a deposit prior to beginning the mediation session. Mediators may retain this deposit if the cancellation was made less than two (2) court days prior to the scheduled date for the initial period.
- d. Mediators will be compensated directly by the parties. The fees and expenses of the mediator must be shared equally by the parties, unless otherwise agreed by the parties. Mediators will be responsible for the collection of fees. The court will not assist with collection or other fee dispute issues pertaining to mediation under the Civil Mediation Program.
- e. Mediators must declare their individual hourly rates and any deposit or cancellation policies in their mediator profile. In addition, parties must be notified in writing upon receiving a referral from the court and prior to the beginning of the first mediation session of the mediator's hourly rate and any deposit, cancellation or other policies.

Draft Civil Mediation Pilot Program Guidelines

15. Case Limits

The Court may impose case limits under the Civil Mediation Program depending on the mediator's caseload. In no instance will a mediator be assigned more than 100 active cases at any one time.

16. Panel Descriptions and Lists

In accordance with California Rules of Court rule 10.781(a), binders containing the Mediator Panel Listing, Subject Area Experience Listing and Mediator Profiles are maintained in the Civil Clerk's Office at the Central Justice Center, and on the Court's ADR web pages.

Although the Court will make the mediator profiles and the subject area experience listing available to the parties to assist in their selection, the court does not independently examine or guarantee the designation of "subject area experience" or "types of disputes handled" on the mediator profiles or the subject area experience listing. Mediators are expected to be entirely candid and accurate in the representation of their background and areas of experience.

17. Mediation Facilities.

- a. It is the expectation of the Court that each mediator on the Civil Mediation Panel will maintain a mediation practice or primary place of business in Orange County. It is also expected that all sessions will be conducted in facilities that are professional and considered appropriate for mediation (i.e., mediation offices, law firms, or other appropriate conference room facilities).
- b. Mediators are expected to arrange their own mediation facilities.
- c. Mediators must ensure that the mediation location can accommodate persons with disabilities. Written guidance concerning the responsibility of mediators to provide disability accommodation can be found at:

http://www.eeoc.gov/mediate/ada/ada_mediators.html

http://www.eeoc.gov/mediate/ada/ada_parties.html

18. Resignation

Any civil mediation panel member may resign at any time by communicating in writing with the ADR Administrator, with the understanding that all cases referred to the mediator will be completed and all forms and program-related materials will be submitted to the Court.

19. Removal

- a. It is a goal of the Court to encourage excellence in mediation practice by setting guidelines, policies and procedures that promote honesty, impartiality and integrity in mediation. The California Rules of Court outline the Court's expectation that mediators will conduct themselves in accordance with the highest ethical standards. Mediators on the civil mediation panel will be expected to comply with all requirements outlined by the Guidelines, Policies and Procedures, and the Rules of Court.
- b. Mediators serve at the pleasure of the Court and may be removed from the civil mediation panel at any time at the sole discretion of the Court without cause.
- c. The Court may use informal or formal means to deal with complaints and/or issues relating to panelist and maintaining excellence in the practice of mediation under the civil mediation program. If a complaint against a mediator is made, the Court will determine whether the mediator will be removed from the active list pending investigation of the complaint.

Draft Civil Mediation Pilot Program Guidelines

- d. In the event a mediator does not comply with the provisions of these Guidelines in order to maintain panel status, the Court may remove the mediator for noncompliance. Once removed, the mediator will be required to submit a new application when the Court is accepting such applications, and must be approved by the ADR Committee in order to again be placed on the Civil Mediation Panel.